19-16122

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,
v.

QUALCOMM INCORPORATED,
Defendant-Appellant.

Appeal from the U.S. District Court
for the Northern District of California
The Honorable Lucy H. Koh (No. 5:17-cv-00220-LHK)

MOTION OF THE HONORABLE PAUL R. MICHEL (RET.) FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF QUALCOMM INCORPORATED'S MOTION FOR PARTIAL STAY OF THE INJUNCTION

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(b), the Honorable Paul R. Michel, former Chief Judge of the U.S. Court of Appeals for the Federal Circuit, now retired, respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Appellant Qualcomm Incorporated's motion for partial stay of the district court's injunction. Neither Appellant Qualcomm nor Appellee Federal Trade Commission ("FTC") opposes the motion.

INTEREST OF *AMICUS CURIAE* AND REASONS WHY THE MOTION SHOULD BE GRANTED

Judge Michel served on the Federal Circuit for over twenty-two years. From 2004 until his retirement in May 2010, he was the chief judge of the court. During his twenty-two years of judicial service, he heard thousands of appeals and authored over 800 opinions, touching on all aspects of the court's jurisdiction, including patent law.

Judge Michel's judicial work extends beyond his patent law expertise, however. He sat by designation on several regional courts of appeals. *See, e.g.*, *Gross v. German Found. Indus. Initiative*, 549 F.3d 605 (3d Cir. 2008) (reparation claims based on Nazi slave labor); *Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817 (9th Cir. 2002)

(complaint alleging that the Circuit Rules prohibiting citation to unpublished opinions violated an individual's constitutional rights); *Elliott Assocs., LP v. Banco De La Nacion*, 194 F.3d 363 (2d Cir. 1999) (whether purchase of debt violated Section 489 of the New York Judiciary Law). *See generally* Hon. James F. Holderman, *Comments on Paul R. Michel's Contributions to Justice*, 10 John Marshall Rev. of Intell. Prop. L. 279 (2010).

While Judge Michel's work on the Federal Circuit is frequently linked to patent law, the Federal Circuit also confronts complex antitrust issues, whether as stand-alone claims that are part of a larger patent case or as counterclaims in response to patent infringement allegations. *See, e.g. In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008); *In re Indep. Serv. Organizations Litig.*, 203 F.3d 1322 (Fed. Cir. 2000); *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998). Indeed, from its inception, the Federal Circuit regularly tackled substantive issues at the interface between antitrust and patent law. *See, e.g.*, *Am. Hoist & Derrick Co. v. Sowa & Sons*, 725 F.2d 1350 (Fed. Cir. 1984).

Since he retired from the Federal Circuit, Judge Michel has maintained an active role in the public dialogue about optimal policies governing intellectual property and U.S. innovation. He has been invited to speak at scores of events, and he has written numerous articles on pressing intellectual property topics. *See, e.g.*, David Kappos & Hon. Paul R. Michel, *The Smallest Salable Patent-Practicing Unit: Observations on its Origins, Development, and Future*, 32 Berkeley Tech. L.J. 1433 (2018); Paul R. Michel & Matthew J. Dowd, *The Need for "Innovation Certainty" at the Crossroads of Patent and Antitrust Law*, CPI Antitrust Chronicle (Apr. 2017); Hon. Paul R. Michel, *Judicial Litigation Reforms Make Comprehensive Patent Legislation Unnecessary as Well as Counterproductive*, 14 Nw. J. Tech. & Intell. Prop. 131 (2016).

In addition, Judge Michel has been invited to testify before Congress on substantive patent law issues that are critical to the Nation's economic health. On July 13, 2017, he testified before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property

and the Internet. On June 4, 2019, he testified before the Senate Judiciary Committee's Subcommittee on Intellectual Property.[1]

Judge Michel has a strong interest in offering his unbiased perspective on the likely implications of the district court's injunction and the complex—and, particularly in this case, controversial—interaction between antitrust law and patent law. Indeed, Judge Michel is the rare expert who has no hidden agenda behind his views. As Judge Michel explained in his recent congressional testimony:

> I have a unique perspective not only as a patent judge but as one completely unhindered by any economic affiliations or interests. I do not represent parties, practice law, own stocks or bonds, serve as an employee of any entity or belong to any lawyers association or trade group. The only exception is unpaid service on the Board of the Intellectual Property Owners Education Foundation, which seeks to educate the public about intellectual property. I receive a Federal pension for 36 years of service. Although I also consult, assignments are diverse as to owners and accused infringers and as to industries, technologies and companies. Therefore, I can be as objective as humanly possible, since I am totally independent.

Testimony of Judge Paul R. Michel (Ret.), Subcommittee on Intellectual Property U.S. Senate Committee on the Judiciary, at 2 (June 4, 2019).

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[1] *See* https://www.judiciary.senate.gov/meetings/the-state-of-patent-eligibility-in-america-part-i.

In sum, Judge Michel is one of the nation's leading patent law experts, having a unique combination of judicial experience, legal expertise, and total absence of any financial conflicts of interest. His sole objective is to respectfully share his perspective as a true friend of the court to ensure that the U.S. patent system creates the optimal incentives for inventors, innovators, and investors—as it has traditionally done. As to the substance, Judge Michel's proposed amicus brief focuses on the public interest prong.

In this case, Judge Michel seeks leave to file his amicus brief to address the public interest prong of whether the Court should grant Qualcomm Incorporated's motion for a partial stay of the injunction. As Qualcomm's motion explains, the district court's order "targets the heart of Qualcomm's business structure—its relationships with both rival chipmakers and OEM customers—imposing a fundamental change in the way Qualcomm has always operated since its founding." Qualcomm Mot. 23. Qualcomm also observes that "the injunction requires Qualcomm to license component supplies exhaustively—something Qualcaomm has never done, that none of the major cellular SEP licensors do outside of cross-licenses, and that would force upon Qualcomm patent exhaustion

issues that would undermine its existing handset-level licensing program." *Id.* at 23–24 (footnote omitted).

These and other likely consequences of the injunction implicate Qualcomm's valuable patent rights. More importantly, the theories underlying the injunction—if adopted more widely—will adversely effect the public interest in having a strong, reliable, predictable patent system. As Judge Michel's amicus brief explains more fully, the public has an important interest in ensuring the reliability of exclusive rights granted by the patent system, which in turn enables private parties—especially sophisticated private parties as in this case—to reach contractual arrangements to license important patent technology.

The public interest in a reliable patent system of course needs to be balanced with the goals of competition law, for example, under the Sherman and Clayton Acts. But too often the analysis overlooks important precedent and reasoned arguments explaining why the public interest generally favors a strong, reliable, and predictable patent system that protects the exclusive right set forth in the U.S. Constitution.

Judge Michel respectfully submits that his amicus brief sheds light on at least the public interest prong of whether the district court's

injunction should be stayed in part. The brief's targeted focus is intended to aid the Court in assessing whether the public interest is advanced by an injunction that disrupts accepted licensing arrangements involving substantial patent portifolios.

CONCLUSION

Judge Michel respectfully submits that the motion for leave to file the amicus brief should be granted.

Date: July 15, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Circuit Rules 27-1(1)(d) and 32-3(2) because it contains 1,205 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 27-1(1)(d).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 15, 2019. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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INTEREST OF AMICUS CURIAE

Judge Michel served on the Federal Circuit for over twenty-two years. From 2004 until his retirement in May 2010, he was the chief judge of the court. During his twenty-two years of judicial service, he heard thousands of appeals and authored over 800 opinions, touching on all aspects of the court's jurisdiction, including patent law.[1]

While Judge Michel's work on the Federal Circuit is frequently linked to patent law, the Federal Circuit has regularly confronted complex antitrust issues. *See, e.g.*, *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008); *In re Indep. Serv. Orgs. Litig.*, 203 F.3d 1322 (Fed. Cir. 2000); *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998). From its inception, the Federal Circuit has tackled issues at the interface between antitrust and patent law. *See, e.g.*, *Am. Hoist & Derrick Co. v. Sowa & Sons*, 725 F.2d 1350 (Fed. Cir. 1984).

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no person or entity, other than Judge Michel and his counsel, contributed monetarily to this brief; and all parties have consented to its filing.

Since he retired from the Federal Circuit, Judge Michel has maintained an active role in the public dialogue about optimal policies governing intellectual property and U.S. innovation. *See, e.g.*, David Kappos & Hon. Paul R. Michel, *The Smallest Salable Patent-Practicing Unite: Observations on its Origins, Development, and Future*, 32 Berkeley Tech. L.J. 1433 (2018); Paul R. Michel & Matthew J. Dowd, *The Need for "Innovation Certainty" at the Crossroads of Patent and Antitrust Law*, CPI Antitrust Chronicle (Apr. 2017). Judge Michel has also been invited to testify before Congress on substantive patent law issues that are critical to the Nation's economic health, most recently on June 4, 2019.

Judge Michel is one of the nation's leading patent law experts, having a unique combination of judicial experience, legal expertise, and total absence of any financial conflicts of interest. His sole objective is to respectfully share his perspective as a true friend of the court to ensure that the U.S. patent system creates the optimal incentives for inventors, innovators, and investors—as it has traditionally done.

ARGUMENT

This Court should grant Qualcomm's motion if: (1) the appeal has a "fair prospect of success"; (2) there is a fair probability that the appellant will otherwise be irreparably harmed; and (3) the public interest favors a stay. *Leiva-Perez v. Holder*, 640 F.3d 962, 970–71 (9th Cir. 2011) (per curiam). Here, the public interest prong strongly favors granting Qualcomm's motion for a partial stay.[2]

I. The Public Interest Favors a Strong Patent System with Reliable, Predictable, Exclusive Rights for Inventors

The public—and our Nation as a whole—have an exceedingly important interest in ensuring that the U.S. patent system grants strong, reliable, predictable rights upon which sophisticated parties can rely. Patent rights are the best way of equitably rewarding inventors and investors for their efforts of bringing new innovation to the public sphere.

The exclusive right secured by a patent is indeed a critical driving force for U.S. innovation and technological progress. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974) ("The patent laws promote this

[2] Judge Michel takes no current position on the ultimate merits of the appeal, which is yet to be briefed. His amicus brief focuses solely on the public interest prong, recognizing possible overlap between the public interest prong and the other two prongs of the analysis.

progress by offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research, and development."). The Founding Fathers recognized its importance by including the exclusive right as the Constitution's only personal right granted. *See* U.S. Const., art. I, § 8, cl. 8. Thomas Jefferson later remarked that "issuing patents for new discoveries has given a spring to invention beyond my conception."[3]

For these and other reasons, a patent owner traditionally had the right to exclude others from infringing his or her patent. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring) ("From at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases."). A patent owner could exclude one from using the invention even if the patent owner did not use it. *See Cont'l Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 424–25 (1908).

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[3] Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. Cal. L. Rev. 993, 1030–32 (2006) (citing Letter from Thomas Jefferson to Benjamin Vaughan (June 27, 1790), in 16 *The Papers of Thomas Jefferson* 579 (Julian P. Boyd ed., 1959)).

It should come as no surprise, then, that "the public interest nearly always weighs in favor of protecting property rights in the absence of countervailing factors, especially when the patentee practices his inventions." *Apple Inc. v. Samsung Elecs. Co.*, 809 F.3d 633, 647 (Fed. Cir. 2015). Strong, reliable, predictable patent rights also form the foundation of an efficient intellectual property licensing marketplace. In fact, our legal system affords great respect to private contractual arrangements governing the sale and licensing of property rights, including patents.

But when that respect and deference are supplanted by novel and questionable theories of antitrust law, the private marketplace loses and the public as a whole suffers. Private firms lose confidence when the aggressive application of antitrust law completely undercuts settled licensing expectations and practices. This is all the more true when the licensing parties are some of the most sophisticated companies in the world.

The public needs judicial outcomes that respect valid patent rights and settled licensing practices. This strong public interest extends beyond the parties to any particular case, and it should be a primary

consideration when deciding to stay an injunction when antitrust claims are asserted against a leading technology company that could unravel complex contracts involving thousands of presumptively valid U.S. patents. *See* 35 U.S.C. § 282.

II. The Injunction Against Qualcomm Threatens to Undermine the Public Interest in a Robust Patent System and Predictable Licensing Environments

In the present case, the district court enjoined Qualcomm from using many of its standard licensing practices, which Qualcomm employed for years to negotiate access to its patented cellular phone technologies. The injunction is extraordinary in its breadth and in its unprecedented interpretation of antitrust obligations in the FRAND and SEP setting. The district court's injunction creates many concerns, but even the two provisions Qualcomm seeks to stay will harm the public interest if not enjoined.[4]

[4] The two injunction provisions are:

> (1) "Qualcomm must make exhaustive SEP licenses available to modem-chip suppliers"; and
>
> (2) "Qualcomm must not condition the supply of modem chips on a customer's patent license status," and in that respect must "negotiate or renegotiate license terms with customers."

The injunction forces Qualcomm to license its patent portfolio to rival chipmakers, but the record suggests that this requirement will interfere with settled patent licensing practices. As Qualcomm's motion explains, all major licensors of cellular patents license their patents not to rival chipmakers but to original equipment manufacturers ("OEMs").

The licensing programs of Qualcomm and its rival chipmakers appear to be rational approaches to capture the true value of the patented technology and to address the potentially negative effects of patent exhaustion. *See generally Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523 (2017); *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617 (2008). With patent exhaustion, "the initial authorized sale of a patented item terminates all patent rights to that item." *Quanta*, 553 U.S. at 625.

Once patent exhaustion attaches, a downstream user of the patented technology has no obligation to compensate the patent owner. Once that happens, the patent owner may not realize the full value of the patented technology. But rational marketplace participants, like Qualcomm and other chipmakers, have determined that their patents are best licensed to OEMs, not to rival chipmakers. Before this licensing

system is completely dismantled by injunction, the district court's decision should be tested on appeal.

The injunction will also unravel numerous licensing agreements. In the usual context, patent licensing is frequently extraordinarily complex. Requiring Qualcomm to undo existing license agreements will create uncertainty and unpredictability in the patent licensing marketplace—a result that is plainly against the public interest.

Given these significant consequences of the district court's injunction, it is near impossible to see how the public will benefit from the immediate implementation of the injunction when that implementation will create confusion in the patent licensing marketplace.

III. The FTC's Enforcement Action Against Qualcomm Rests on a Controversial Effort to Use Antitrust Law to Police and Restrict Intellectual Property Rights

The public interest supports a stay also in view of the existing controversy about the proper role of antitrust law in restricting the patent rights of inventors.

Respected scholars even express disagreement about the respective roles of antitrust and patent law. Many see antitrust law as focusing on

reducing costs to consumers in the short term, whereas patent law allows higher short-term pricing to encourage long-term social gains by increased innovation. Put another way, "patent and antitrust laws are complementary." *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 877 (Fed. Cir. 1985). Indeed, patents serve "a very positive function in our system of competition" by encouraging investors to risk the capital needed to develop innovation. *Id.*

Others, however, suggest that this distinction is incorrect because "antitrust policy has always been concerned with performance over both the short and long runs and often considers effects on innovation." Herbert Hovenkamp, *Antitrust and the Patent System: A Reexamination*, 76 Ohio St. L.J. 467, 471 (2015). While the former view seems more widely accepted, what matters is the lack of consensus about even the basic role of antitrust law vis-à-vis patent-incentivized innovation.

Antitrust law certainly has a proper place in the patent space, mainly to prevent patent misuse, a well-defined wrong. *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 140 (1971). But that is not what the FTC charges here. Rather, it sued to force the renegotiation of private contractual agreements and to devalue patents,

a form of private property. Given that the license fees were agreed to by extremely sophisticated, highly successful, cash-rich companies who understand the value of the patented technology, these private contracts should not have been subjected to an unprecedented FTC enforcement action based on unsupported legal theories.

All this urges caution before imposing any court-ordered change in established business practices. Leading antitrust scholars have warned against the harm that will be caused by the overreach of antitrust law in the SEP and FRAND contexts. *See, e.g.*, Douglas H. Ginsburg, Taylor M. Ownings, & Joshua D. Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions*, The Antitrust Source, Oct. 14, 2014, at 1 (explaining that "the application of antitrust law in this situation could, by undermining the ability of courts to tailor appropriate remedies, diminish the incentives for companies to innovate and for industries to adopt standards").

IV. The So-Called "Patent Holdup" Argument Lacks Evidentiary Support and Should Not Trump the Exclusive Right Enshrined in the Constitution

Consideration of another element is warranted when assessing the public interest vis-à-vis patent rights and possible antitrust liability. It is the alleged problem of the "patent holdup." In short, no evidence supports the oft-repeated claims that predictable patent rights lead to a holdup problem that, in turns, leads to antitrust violations.

Respected legal scholars have repeatedly explored the fallacy associated with the patent holdup argument. *See* Alexander Galetovic & Stephen Haber, *The Fallacies of Patent Holdup Theory*, 13 J. Competition L. & Econ. 1 (2017); Jonathan M. Barnett, *Has the Academy Led Patent Law Astray?*, 32 Berkeley Tech. L.J. 1316, 1344 (2017) (detailing the lack of empirical evidence for the patent holdup theory); Damien Geradin, *The Meaning of "Fair and Reasonable" in the Context of Third Party Determinations of FRAND Terms*, 21 Geo. Mason. L. Rev. 919, 940 (2014) ("[A]lthough holdup and royalty stacking could occur in theory, there is little evidence that they regularly occur in the real world."); J. Gregory Sidak, *Holdup, Royalty Stacking, and the Presumption of Injunctive Relief for Patent Infringement: A Reply to Lemley & Shapiro*, 82 Minn. L.

Rev. 714, 718–19 (2008) (discussing studies that expose the infirmities in the patent holdup and royalty stacking theories).

Nevertheless, and without specific evidence, commentators continue to assert that patent holdup is a real-world problem. The present case rests on the FTC's implication that Qualcomm, as the leading modem chip innovator, could create an anticompetitive patent holdup. But the facts show otherwise. Ultimately, it is contrary to the public interest to impose potentially devastating business-altering obligations on a leading U.S. company when those obligations rest on, at least in part, controversial and ultimately unsupported legal theories about patent holdup.

V. The Controversial Nature of This Antitrust Action Further Weighs Against the Public Interest

The American public undoubtedly has a significant interest in maintaining a predictable legal regime that governs social and economic conduct based on empirically rational rules. The injunction risks creating the opposite. The public interest thus weighs in favor of staying the injunction so as to avoid likely economic and legal disruptions extending beyond this case, especially given the extraordinary circumstances surrounding the FTC's decision to bring this action.

Qualcomm is one of the Nation's leading innovators. As Qualcomm's motion explains, Qualcomm scientists have invented critical aspects of cellular phone technology, protected by 140,000 domestic and foreign patents and pending patent applications.

Rapidly gaining ground, however, are Huawei and other Chinese-based companies that want to dominate the international marketplace. The Chinese government financially supports Huawei and others, including with China's recently announced "Made in China 2025"—a government-led industrial policy that hopes to make China the dominant player in global high-tech manufacturing.

The concern with China rests not on xenophobia but on the rational objective of maintaining the United States' important global leadership role in innovation, as well as protecting our national security. The United States has been the global economic leader for decades, attributable in no small part to its patent system. But the international marketplace is changing, with China aggressively seeking to dominate critical technological fields—often by theft of intellectual property from the

United States. *See* Erik Sherman, *One in Five U.S. Companies Say China Has Stolen Their Intellectual Property*, Fortune (Mar. 1, 2019).[5]

Notwithstanding Qualcomm's importance to the U.S. economy and national security, and notwithstanding the Chinese government's continuing efforts to gain an economic advantage, the FTC voted 2–1 to commence the present enforcement action, over a rare written dissent by Commissioner Maureen K. Ohlhausen. It was a controversial decision, to say the least. *See* Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In the Matter of Qualcomm, Inc.*, No. 141-0199 (Jan. 17, 2017) (describing "an enforcement action based on a flawed legal theory . . . that lacks economic and evidentiary support, that was brought on the eve of a new presidential administration, and that, by its mere issuance, will undermine U.S. intellectual property rights in Asia and worldwide").

Other events have added to the extraordinary discord that warrants a stay to protect the public interest. In March 2018, President Trump, upon recommendation by the Committee on Foreign Investment in the United States ("CFIUS"), blocked the proposed takeover of

[5] https://fortune.com/2019/03/01/china-ip-theft/.

Qualcomm by Singapore-based Broadcom Ltd.[6] That decision recognizes Qualcomm's critical technological leadership. CFIUS was concerned because "a weakening of Qualcomm's position would leave an opening for China to expand its influence on the 5G standard-setting process." A252.

Another manifestation of the controversy was the Department of Justice's submission to the district court, cautioning that an injunction may harm "competition and consumers" and explaining that "the obligations courts impose often have far-reaching effects and can reshape entire industries." A258. The conflicting views of FTC and DOJ warrant extreme caution before imposing any remedy that might irreparably harm Qualcomm, its employees, and U.S. national security.

All this leads to very probable harms to the public interest if the injunction is not stayed. It is not just harm to Qualcomm, but harm to the American public and the U.S. economy because harming Qualcomm contravenes the public interest. *See* David Teece, *The 'Naked Tax' in* FTC

[6] Exec. Order, *Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited*, 83 Fed. Reg. 11631 (Mar. 15, 2018).

v. Qualcomm *is Patently Absurd*, Law360 (Feb. 1, 2019) ("The FTC risks existential harm to an important American technology developer.").[7]

VI. Conclusion

For these reasons, the public interest prong favors a stay of the injunction.

Date: July 15, 2019

Respectfully submitted,

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[7] https://www.law360.com/articles/1124762/the-naked-tax-in-ftc-v-qualcomm-is-patently-absurd.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 15, 2019. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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